IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1896.

No. 62

J. J. DOUGLASS, Plaintiff in Error,

vs.

THE COMMONWEALTH OF KENTUCKY,
Defendant in Error.

BRIEF ON MOTION TO DISMISS OR AFFIRM.

W. S. TAYLOR,
Attorney General for Kentucky.
WM. GOEBEL,
Of Counsel for Defendant in Error.

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vs.

THE COMMONWEALTH OF KENTUCKY, Defendant in Error,

BRIEF ON MOTION TO DISMISS OR AFFIRM.

May it please the Court:

This is a writ of error from the Court of Appeals of Kentucky, in the Frankfort lottery case.

This case would not have been passed last October except for the fact that counsel for the defendant in error was asked to do so until after the 4th of March, 1897, because at that time one of the lawyers for plaintiff in error was a member of the President's cabinet and asked that the case be passed until the expiration of his term of office, to-wit, the fourth of March, 1897, but since no agreement can now be reached as to the date of argument we feel that this motion should be made and the lottery first suppressed by an act of the Legislature and then by the new Constitution of Kentucky and condemned by its highest court finally suppressed.

ON THE MOTION TO DISMISS.

The judgment of the Court of Appeals of Kentucky reversing that of the Louisville Law and Equity Court, declared by reference to the opinion which leads up to it that James J. Douglass has not the right to conduct the so-called Frankfort lottery because its charter had been repealed by the Legislature, and because, moreover, the Constitution of 1891 had revoked all former lottery franchises and forbidden the granting of new ones. The writ of error was applied for, in form, on four grounds, but in reality, on one single ground, namely, that the State of Kentucky, in repealing the charter formerly enjoyed by Douglass, had passed a law impairing the obligation of contracts, and the highest court of the State had thus denied to the applicant a right claimed under the Constitution of the United States.

We might have asked a dismissal on the ground that the judgment appealed from is not final, as it remands the cause to the lower court with directions to proceed in conformity with the opinion. But, so far from asking a dismissal on this ground, we beg your Honors to pass by any irregularity on that score; we are even prepared to argue that the judgment was final within the authorities. It is said in United Mutual Insurance Co. v. Kirchoff, 160 U. S., 374, decided at this term, that the rule by which a judgment remanding to the lower court with directions to conform to the opinion is *well-nigh* universal; it is said further that the rule must apply at all events when the opinion is not in the record. It seems to follow that when the opinion is in the record, it may be such as to stamp the mandate of reversal with directions to conform to the opinion as final. The test of finality is this: That there can be no appeal from the judgment rendered by the lower court upon the mandate, because no judicial discretion is left to that court. If such is the case, there must be an appeal or writ of error from the mandate of reversal; otherwise, this remedy would fail altogether. This test brings us to the two cases of Stewart v. Salamon, in 94 and 97 U. S., which were invoked by the plaintiff in error in the case just quoted from 160 U. S., but which could not aid them, as their own case was very different. In Stewart and Salamon, there was first a judgment upon a demand and a credit; upon appeal this court fixed, in

a reversing opinion, both the demand and the credit, and sent the cause back for proceedings "in conformity to this opinion." The lower court rendered its judgment for the number of dollars debt, less the number of dollars allowed as credit by this court; and an appeal from this judgment was dismissed upon the ground that it was in reality the judgment of this court. In like manner, the mandate of the Court of Appeals of Kentucky, by referring to an opinion which declares the clause in the State Constitution, abolishing all old lottery franchises, and forbidding any new ones, valid, leaves absolutely nothing to the Law and Equity Court to decide. For the proceeding is in the nature of a *quo warranto*, and seeks nothing but a judgment declaring that Douglass has no lottery franchise. The mandate of reversal, which is before your Honors, leaves no room for discretion in the lower court. The latter must obey it by entering at once the declaration: "Douglass has not and can not have a lottery franchise." Just as in Stewart v. Salamon, the circuit court had to obey, and to enter a judgment for so many dollars and so many cents.

It will be asked, why do we, as defendants in error, argue against a ground of dismissal which seems so plausible? Plain enough! Because a dismissal for want of finality would leave matters for two or three years longer in the disgraceful condition in which they now are. The plaintiff in error would not be barred from suing out a new writ of error with supersedeas after the present writ is dismissed; and very probably during all the years that would be thus consumed the octopus would go on sucking in the life blood of the poor of four cities.

We ask a dismissal of the writ upon an entirely different ground, one that will make an end of this controversy, namely, that no Federal question is involved.

The pretended lottery franchise which the plaintiff in error sets up was contained in an act of the Legislature of Kentucky enacted in 1869, amending and revising the laws for the government of the city of Frankfort. By that section the city authorities were, by reference to an older town charter enacted in 1838, authorized to run a lottery for the benefit of the public schools of Frankfort. In 1872 the council was authorized to sell and alien any property or franchise of the city.

The repeal of the act of 1869 is assigned as a "law impairing the obligation of contracts." It is a familiar principle, laid down by Dillon in his Municipal Corporations, too well known to require authorities to be cited in this court, that a munici-

pal charter in this country is not a contract; that cities and towns are no more than subdivisions of the State government, liable to be blotted out at any time in the discretion of the Legislature. If the Federal question can be raised in this case, because the State of Kentucky has chosen to change one section in the organic law of the city of Frankfort, a Federal question can be raised in every case of a charter amendment; and as our city charters are continually changed and overhauled, almost every case growing out of municipal affairs might be brought here by writ of error from the State courts, causing infinite delay and clogging the business of this court beyond endurance.

We are fortunate enough to find a case exactly in point. It is New Orleans v. New Orleans Water Works, 142 U. S., 79. We quote from the syllabus:

"Before this court can be asked to determine whether a statute has impaired the obligation of a contract, it must be made to appear that there was a legal contract subject to impairment, and some ground to believe that it was impaired."

Again:

"A municipal corporation, being a mere agent of the State, stands in a governmental or public character, in no contract relation with the sovereign, at whose pleasure its charter may be amended, changed or revoked without the impairment of any constitutional obligation; but such a corporation, in respect to private or proprietary rights and interests, may be entitled to constitutional protection."

This court (with the dissent of only one of the justices) dismissed the cause for want of jurisdiction, on the ground that the legislative amendment of the city charter did not present a sufficient semblance of impairing a contract, to raise the constitutional point.

Mr. Justice Brewer says in his opinion (p. 87):

"The bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, *otherwise a Federal question might be set up in almost every case and the jurisdiction of this court invoked simply for the purpose of delay.*" He then quotes Millingar v. Hartupee, 6 Wall., 258.

The absurdity of calling a clause in a city charter, which gives to a city one means, among others, for raising revenue a contract; the still greater absurdity of giving this name to a law imposing a license tax, takes this writ of error outside of

the requirement stated by Mr. Justice Brewer, that there must be "some foundation" for the Federal question. But the last prop is taken away by the Kentucky act of February 14, 1856, reserving the right of legislative repeal, which precedes all the legislative acts relied on by the plaintiff in error; and which was enforced by this court in Louisville Water Works v. Clark, 143 U. S., 1, and is again referred to hereafter. This act takes the case at bar clearly beyond the limitation above quoted from the New Orleans case, that there must have been "a legal contract subject to impairment."

We also refer on this branch of the case to Winona Ry. Co. v. Plainview, 143 U. S., 371.

We therefore call upon your Honors to dismiss this cause for the want of a Federal question, and thus to rid yourselves from this attempt of greed, strutting in the guise of vested rights, to drag your august seat of justice and the sacred words of the National Constitution to its base purposes and to discourage like attempts in the future.

But if this can not be done, we must succeed on the second branch of our motion, which is

TO AFFIRM.

A rule promulgated on the 8th day of May, 1876, says:

"There may be united with a motion to dismiss a writ of error to a State court a motion to affirm on the ground that, although the record may show that the court has jurisdiction, it is manifest that the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."

This rule was adopted two years earlier than another which gave the same right to move, "to dismiss or affirm" in cases coming up by writ of error or appeal from the United States Circuit Courts. It was so adopted, because the writs of error to State courts were so very often flimsy, and the constitutional or other Federal questions involved in them so very thin.

That the writ of error in this case is taken for delay is clear enough to any one who considers the heavy profits which a lottery, practically the only one left in the United States, gathers up by its daily drawings, and the futility of the supersedeas bond. For how can the Commonwealth of Kentucky

under this bond recover from the plaintiff in error and his associates one cent of the fabulous profits which they extract from its people while this writ of error is awaiting decision? The motives for delay are immeasurably greater than in the ordinary case of a judgment for the recovery of money, for the ond to stay such a judgment secures not only the body of the thing recovered, but also the fruits or interest.

That the question raised is "so frivolous as not to need further argument," means, under the decisions of this court in which the rule has been enforced, simply this: That the very point has been passed upon by this court deliberately and unanimously. We refer to Swope v. Leffingwell, 105 U. S., 3, where Chief Justice Waite said this and no more:

"We have jurisdiction of this case. The motion to dismiss is therefore denied; but as the only Federal question presented on the merits was decided by the court below in accordance with our rulings in National Bank v. Matthews and National Bank v. Whitney, the motion to affirm is granted." In at least fifteen cases the motion to affirm has since been granted upon like grounds.

In the case at bar the highest court in Kentucky decided the only would-be Federal question in accordance with the rulings of your Honors, in Stone v. Mississippi, 101 U. S., 814, rulings which were foreshadowed in Boyd v. Alabama, 94 U. S., 645, and which were approved in New Orleans v. Houston, 119 U. S., 265, 274. There is not the faintest prospect that your Honors will ever recede from the position there taken, that you will ever concede the power of a State to barter away its power and duty to watch over the public morals. The three cases were much stronger on the side of franchise than that at bar, for it had in each of them been granted to an individual or to a private corporate body, while in the case at bar the pretended franchise has been granted to a city. Hence the power of the Commonwealth to revoke the franchise "needs no further argument."

The other point against the binding force of the act of 1869 as a contract, namely, the preceding declaratory act passed by the Legislature of Kentucky on the 14th of February, 1856, was not mentioned in the opinion of the Court of Appeals of Kentucky as a ground for its judgment; but it has, as shown, above, been recognized by this court, and must be recognized again. The case of the Louisville Water Works against the Commonwealth of Kentucky must be well known to parties

and to counsel in this case, and they can not hope that it will be overlooked by the court. For this reason also, "the Federal question needs no further argument."

We hope that by a speedy dismissal for want of a Federal question, or by an affirmal under the rule of 1876, this court will put its stamp of disapproval on the disgraceful business which the people of Kentucky have for years been laboring to suppress, and that it will send the Frankfort lottery to the jungles of Honduras to seek the company of its sister from Louisiana or, for our part, to the North Pole.

Respectfully submitted,

WM. S. TAYLOR,
Attorney-General for Kentucky.

WM. GOEBEL,
Counsel for Defendants in Error.

neither Section 226 of the State Constitution abolishing all lotteries, nor the Act of 1890 repealing the Act of 1869, did affect plaintiff's right under said contract. On the other hand, it is contended for the State that no one can acquire a vested right in a lottery franchise that is not subject to repeal, and that the provision of the Constitution of the United States which provides that, "No State shall pass any *ex post facto* law, or any law impairing the obligation of a contract," does not protect or embrace contracts under lottery franchises; that the grant of the lottery privilege by the State was an exercise of its police, not its contractual power, which police power is inherently lodged in the State for the promotion and protection of its morals, welfare and happiness, which the State can not surrender and barter away either as a gratuity or for pay; and while the Legislature may in the exercise of its police power grant a lottery privilege, the grant is only a privilege or a license—only an indulgence—a suspension for the time being of the law against gambling and not a contractual right, and that any subsequent Legislature in the interest of good order and morals may revoke the license, and repeal the grant, although pecuniary interest may have been acquired under and by authority of the grant.

The Dartmouth College Case has been much relied upon by the plaintiff in error to uphold the validity of his contract. There is a very great difference as we contend between the principles involved in that case and of those in the one at bar. That case affected a private corporation organized for benevolent purpose and was not of a public nature. The case at bar is peculiarly public in its nature, invading the governmental functions of the State, and affecting the public morals. Justice Story in his opinion in that case says: "In my judgment it is perfectly clear that any act of a

Legislature which takes away any powers or franchises vested by its charter in a *private* corporation . . . is a violation of the obligations of that charter."

The principle announced in the Dartmouth College Case was never intended to be applied to public or *quasi* public corporations, or to legislative acts affecting the public interests, public morals and governmental powers of the State. The doctrine even as applied to rights acquired under charters affecting only private interests has been severely criticised. It has been insisted that the legislative power which granted could also annul; that the creature could not rise above the creator; and that the doctrine even as thus applied led to a multitude of evils. However, this may be, the doctrine therein expressed is too well established to be overthrown, nor do we contend that it should be. It is firmly imbedded in the jurisprudence of this country, and must be accepted as the law of the land. But it does not follow that this doctrine should be so extended as to render impotent the Legislature in its governmental powers when attempting to eliminate a public evil. The Court in deciding the Dartmouth College Case confined the doctrine of vested rights obtained under legislative grants to franchises of a private nature, but declared that the right to repeal in those cases exists where that right is reserved either by constitutional provisions, or by special or general enactment of the Legislature.

I.

The Frankfort Lottery Franchise is repealable, for the reason that the power to alter, amend or repeal was expressly reserved, because of the existence, at the time of the grant, of the provisions of the Act of 1856, which specifically reserved to the Legislature the power to repeal all subse-

quent acts, the provisions of said act bearing upon the question at issue are: "All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the Legislature, unless a contrary intent be therein plainly expressed: Provided, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested." (Chap. 68, Sec. 8, Page 862.)

II.

Independent of the Act of 1856, lottery grants being of a public nature are repealable and subject to legislative control.

The importance of recognizing the distinction between public and private corporations and excepting the former from the principle laid down in the Dartmouth College Case has become more and more apparent with the growth of corporations, and the wants and necessities of our civilization, and has been realized and emphasized by the best jurists of the land.

The great doctrine of the right of Legislatures to control charters of a public or *quasi* public nature, by altering, amending or repealing them, was early announced in this Court, in a leading case of Charles River Bridge Co. vs. Warren River Bridge Co., 11 Peters, 547.

The Charles River Bridge case is a light-house on a dangerous shore. That was a case where the appellant had accepted a franchise and expended large sums of money under it, and had paid and was bound to pay a large annuity to Harvard College, in consideration of the right to exact specific tolls. The Legislature of Massachusetts afterwards

by grant to the Warren River Bridge Co. undertook, in effect, to deprive the first named company of all tolls. Counsel for the appellant in that case relied upon the Dartmouth College Case. They insisted, as plaintiff in error does here, that their client had a vested right in its franchise, which was protected by the constitution. But the Court ruled otherwise, announcing the vital principle, that "in grants affecting the public nothing passes by implication," and holding, that in such cases the right to alter, amend or repeal the grant exists whether expressly reserved or not.

This principle, so vital to the public welfare, has ever since been recognized by this Court. It has often been applied to cases involving the public health and morals, and has generally been designated as the police power of the State. But, called by whatever name, it is one and the same power. It is simply the power of sovereignty. It is the power to govern men and things. In all matters affecting the public welfare, this power must needs be exercised regardless of previous grants, because it is the prime end of government to minister to the public good, and no Legislature has the power to barter away the general welfare. Behind Legislatures, back even of constitutional conventions, is this great Bill of Rights, this Magna Charta, of which the people can not rightfully be dispossessed.

So no man can have a vested right in a public nuisance; hence fencing laws, stock laws, quarantine, local option and usury laws have been upheld; and so the right to regulate the price of bread, the charges of tavern, railroads and warehouses have been sustained.

In the Warren River Bridge case supra, the Court said: "The object and the end of all government is to promote the happiness and prosperity of the community for which

it is established, and it can never be assumed that the government intended to diminish its powers for accomplishing the end for which it was created."

And in Boyd vs. Alabama, 94 U. S. 650, the Court said: "We are not prepared to admit that it is competent for one Legislature by any contract with an individual to restrain the power of a subsequent Legislature to legislate for the public welfare."

In the case of Butchers Union Company vs. Crescent City Company, 111 U. S. 750, the Court said:

"While we are not prepared to say that the Legislature can make valid contracts on no subjects embraced in the largest definition of the police power, we think that in regard to two subjects so embraced, it can not by contract limit the exercises of those powers to the prejudice of the general welfare. They are the public health and the public morals. The preservation of these is so necessary to the best interests of social organization, that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the suppression of crime."

In Fertilizing Co., vs. Hyde Park, 97 U. S. 666, the Court said: "Every reasonable doubt is to be resolved adversely. Silence is negation. Nothing is to be taken as conceded, but what is given in unmistakable terms, or by implication equally clear. This doctrine is vital to the public welfare, it is axiomatic in the jurisprudence of this Court." And so this Court has uniformly held, as we think, that in matters affecting the public, the right to alter, amend or repeal the grant exists by implication. See 128 U. S. 174; 108 U. S. 531; 94 U. S. 181; 132 U. S. 75; 106 U. S. 307. See also 10 How. 511; 13 How. 71; 1st. Wallace 116; 96 U. S. 63; 97 U. S. 697; 103 U. S. 1; 108 U. S. 506.

These cases decide that wherever the general welfare is

concerned, the right to alter, amend or repeal exists by implication, unless the right to so alter, amend or repeal has been expressly parted with. Indeed the Court has intimated time and again that this is a right that can not be abrogated, even if attempted; that it can not be bargained away even by express words. (11 Peters, 547; 108 U. S., 541; 94 U. S., 645; 118, U. S., 586.)

In 34th Federal Reporter, page 481, Justice Love says: "No government can rightly delegate to individuals or corporations its high duties, so far as to place them beyond its power of supervision and control." It is upon this basis that the decisions known as the Granger cases rest.

In those cases, the Court held that the Legislature could control the rates of warehouses and railroads by general laws, regardless of the rates allowed in the charters.

What is known as the Chicago Lake Front Case, decided December 5, 1892 (See Ill. Central R. R. Co. vs. Ill. Sup. Ct. Rep., Vol. 13, No. 5, Ill), applies the principles here contended for to an extreme case. In that case the State held the title to certain lands under navigable waters and for a valuable consideration granted them to the railroad company and afterwards repealed the grant. The Circuit Court sustained the repealing act, and, on appeal, the Supreme Court affirmed the case, holding that it is not within the legislative power of the State to abdicate such trusts, and that where one Legislature cedes such lands, another may repeal the act.

The Court says: "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them under the use and control of private parties . . . . . than it can abdicate its police powers in the administration of government and the preservation of

the peace. In the administration of government the use of such powers may, for a limited period, be delegated to a municipality or other body, but there is always with the State the right to revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters; they can not be placed entirely beyond the direction and control of the State.

"The harbor of Chicago is of immense value to the people of the State of Illinois, in the facilities it affords to its vast and constantly increasing commerce, and the idea that its Legislature can deprive the State of control over its bed and waters, and place the same in the hands of a private corporation, created for a different purpose, one limited to transportation of passengers and freight between distant points and the city, is a proposition that can not be defended.

"The soil under navigable waters being held by the people of the State in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is therefore appropriately within the exercise of the police power of the State.

"In Newton vs. Commissioners, 100 U. S., 548, it appeared that by an act passed by the Legislature in Ohio, in 1846, it was provided that upon the fulfillment of certain conditions by the proprietors or citizens of the town of Canfield, the county seat should be permanently established in that town. Those conditions having been complied with, the county seat was established therein accordingly. In 1874 the Legislature passed an act for the removal of the county seat to another town. Certain citizens of Canfield thereupon filed their bill, setting forth the act of 1846, and claiming that the proceedings constituted an executed contract, and prayed for an injunction against the contemplated removal. But the Court refused the injunction, holding that *there could be no*

contract and no irrepealable law upon governmental subjects, observing that legislative acts concerning public interests are necessarily *public laws;* that every succeeding Legislature possesses the same jurisdiction and power as its predecessor; that the *latter have the same power of repeal and modification which the former* had of enactment—neither more nor less; that all occupy, in this respect, a footing of perfect equality; that this necessarily is so, in the nature of things; that it is vital to the public welfare that each one should be able at all times to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.

"The Court, treating the act as a license to the company, observed that it was deemed best, when the act was passed, for the public interest, that the improvement of the harbor should be effected by the instrumentality of a railroad corporation interested to some extent in the accomplishment of that result, and said: But if the State subsequently determined upon consideration of public policy, that this great work should not be intrusted to any railroad corporation, and that a corporation should not be the owner of even a qualified fee in the soil under the navigable waters of the harbor, no provision of the national or State Constitution forbade the General Assembly of Illinois from giving effect by legislation to this change of policy. It can not be claimed that the repeal of the Act of 1869 took from the company a single right conferred upon it by its original charter. That act only granted additional powers and privileges, although in consideration of the grant of such additional powers and privileges for which the railroad company paid nothing, it agreed to pay a certain per centum of the gross proceeds, receipts and incomes which it might derive either from the lands granted by the act, or from any improvements erected there. But it was not absolutely bound, by anything contained in the act, to make use of the submerged lands for the purpose contemplated by the Legislature, certainly not within any given time, and could not

have been called upon to pay such per centum until after the lands were used and improved, and income derived therefrom. The repeal of the act relieved the corporation from any obligation to pay the per centum referred to, because it had the effect to take from it the property from which alone the contemplated income could be derived. So that the affect of the Act of 1873 was only to remit the railroad company to the exercise of the powers, privileges, and franchises, granted in its original charter, and withdraw from it the additional powers given by the Act of 1869 for the accomplishment of certain public objects. If the act in question be treated as a mere license to the company to make the improvement in the harbor contemplated as an agency of the State, then we think the right to cancel the agency and revoke its powers is unquestionable."

It must be conceded that a lottery franchise is of a *quasi* public nature. It affects the public morals. Everywhere it is spoken of as a mere privilege or license.

In Gregory vs. Shelby College, 2 Met. 589, upon which case plaintiff in error so much relies it is said:

"The grant of a privilege to raise money by lottery is a mere gratuity; it is not an act of incorporation. It confers no chartered right, nor does it amount to a contract." True the conclusions of the Court in that case were not ,we think, in accord with its opening declarations. If no charter right existed and no contract was made then Gregory had certainly acquired no vested interest. All doubt is removed upon this point in the case of Stone vs. Mississippi, 101 U. S., 814, where the Court says:

"Lotteries as they fall clearly within the *police* power of the State may be suppressed at any time within the discretion of the Legislature. Any one who accepts a lottery charter does so with the implied understanding that the people in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when

the public good shall require, whether it be *paid for or not.* All that one can get by such a charter is a suspension of certain *governmental rights* in his *favor, subject to withdrawal at will.* He has in legal effect nothing more than a license to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a *permit* good as against existing laws, but subject to future legislative and constitutional control or withdrawal."

Then it must be conceded that the original grantee obtained only a suspension of certain governmental rights in his favor subject to withdrawal at will. Subject to abrogation at any moment. Having only this license, to exist at will of the Legislature it could sell this and nothing more. The grantee could only part with that with which it was vested. The city was authorized to operate a lottery subject to the will of the Legislature and to transfer that right subject to the same power. The Legislature of Kentucky and the constitutional convention have done nothing more than repeal all lottery franchises and declare the operation of same illegal. This power the Courts have declared the Legislature had the right to exercise as a police regulation, and the Act of 1856, by specific provisions which was by the general law made a part of each lottery charter granted thereafter specifically reserved that right even if the Courts had not already determined it as a proper exercise of the police power in the absence of any specific provisions for a repeal. We contend that the plaintiff in error by his contract with Stewart under no conditions obtained a vested right further than the right to operate said lottery until terminated by the Act of the Legislature, and can not now be heard to complain that the act repealing the lottery franchises was an act impairing the obligations of a contract. He had nothing but a contingent right dependent alone

upon the will of the legislative power. In the case of Chicago, etc. vs. Iowa, 94 U. S., 155, the Court says: "Neither does it affect the case that before the power was exercised the company had pledged its income as security for the debts incurred, and had leased its road to a tenant that relied upon the earnings for the means of paying the agreed rent. The company could not grant or pledge more than it had to give. *After the pledge and after the lease the property remained within the jurisdiction of the State, and continued subject to the same governmental powers that existed before.*"

The early decisions in many of the State Courts, especially Missouri and Louisiana sustained the contention of plaintiff in error, but subsequent to the decision of the case of Stone vs. Mississippi, the universal tendency has been in the other direction. For instance, in the case of Kellam vs. State, and Edwards vs. Jager, 19th Ind. 407, contracts made under lottery grants were sustained. But after the opinion in Stone vs. Mississippi, the Supreme Court of Indiana in the case of State vs. Woodward, 89 Ind., 110, overruled their former decisions saying, *inter alia*:

"Since the case of Kellum vs. State, 66 Ind., 588, was decided, the decision of the Supreme Court of the United States in the case of Stone vs. Mississippi, 101 U. S., 814, has been reported, in which the same question was involved. In that case, an act of the Legislature of Mississippi was passed in 1867, creating a corporation, giving it power to establish and conduct a lottery, to continue in existence twenty-five years. In 1869 a Constitution of the State was ratified providing, among other things that the Legislature shall never authorize any lottery, nor shall the sale of lottery tickets be allowed, nor shall any lottery, heretofore authorized, be permitted to be drawn, or tickets therein to be sold. Subsequent legislation was provided enforcing the pro-

visions of the Constitution. It was held that the State might, in the exercise of its police power, and in the interest of public morals, take away and abrogate the lottery privilege theretofore granted, without impairing the obligation of contracts within the meaning of the Constitution of the United States. We quote the following passage from the opinion of the court in the case: 'Any one, therefore, who accepts a lottery charter does so with the implied understanding that the people, in their sovereign capacity and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. All that one can get by such a charter is a suspension of certain governmental rights in his favor, subject to withdrawal at will. He had, in legal effect, nothing more than license, to enjoy the privilege on the terms named for the specified time, unless it be sooner abrogated by the sovereign power of the State. It is a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal.'"

While it is true that a number of State Courts have sustained such contracts as plaintiff in error relies upon under lottery grants similar to the one in this case, yet it is true, that most of these decisions were made at the time when the science of law and government, in the domain of police power had not by any means reached the limits of its present development. The law is a progressive science. "Governments are instituted among men for their happiness," and private interests must always yield to the public good. The demand and the necessities of the present and advancing civilization are illustrated everywhere. Private interests must give way for the public good. The Legislature can not, neither can the people surrender the right of police regulation. The future civilization ought not to be bound by the acts of the past, which deprive them of the right to self protection. No Legislature ought to have the right,

for consideration or without it, to fasten upon future society and civilization a moral leper. That a lottery is a vice goes without question. Its victims and patrons fill the almshouses, the jails and penitentiaries. There is no habit which so quickly undermines and destroys human character and blasts human hope and depraves the human heart as the gambling habit. In the years gone by the Courts have, in many States, winked at and suffered those evils, but as the morals and civilization of this country grew apace the courts everywhere have been receding from their former position, and the lotteries, like the institution of human slavery, which once boasted that it sheltered under constitutional right, will soon be blotted from the earth. And when that work is consummated the civilization of the world will have made great strides. In 1849 the framers of the Constitution of the Commonwealth of Kentucky, framed by her wisest statesmen, with jealous care placed in the "Ark of the Covenant" of that instrument, the bill of rights, these words: "The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave and its increase is the same are as inviolable as the right of the owner of any property whatever." Yet, in spite of this fervid declaration, civilization marched on, and in less than fifteen years every slave in Kentucky was a free man. And the descendants of the men who drew the foregoing declaration with equal pride and determination, in a constitutional convention, imbedded in their organic law the following words: "Slavery and involuntary servitude, in this State, are forbidden, except as a punishment for crime, whereof the party shall have been duly convicted." And so it has always been, private interests and rights, whenever these interests and rights impeded the progress of civilization, or became a public wrong and in-

jury, have been swept away for the general public good. For years the legislative department of Kentucky, composed of the representatives from among the people, have struggled incessantly to relieve the State of the odium and disgrace of the lottery curse. But the great lottery companies, with their alert and learned counsel, always found some way to subvert the will of the people and evade the enforcement of the law. In 1891 the constitutional convention, composed of the ablest men from all the various avocations of the people of Kentucky, with frenzied zeal imbedded in the Constitution these words: "Lotteries and gift enterprises are forbidden, and no privileges shall be granted for such purposes and none shall be exercised, and no schemes for similar purposes shall be allowed. The General Assembly shall enforce this section by proper penalties. *All lottery privileges or charters heretofore granted are revoked.*" (Section 226, Kentucky Constitution.) This Constitution was submitted to the people for their ratification, and received a majority of 138,000.

Thus the people of the State at every forum where they could have a voice have solemnly declared against the evil of the lotteries. It is not strange. The wise and thoughtful everywhere had seen the evil winding its coils about society, demoralizing youth and manhood. Can it be possible that the people, in their sovereign power, have no right to rid their State of this moral plague? An evil which this generation, it must be conceded, had no part in creating. Were it so, it seems to us the dearest right that belongs to society, that of self protection, would be denied. As bearing upon the police power we quote the following extracts which may serve to indicate its limits:

Judge Cooley says: "The police power of a State, in a comprehensive sense, embraces its whole system of internal

regulation, by which the State seeks not only to preserve the public order and to prevent offenses against the State, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as it is reasonably consistent with a like enjoyment of rights by others.

"The police power of a State is co-extensive with self-protection, and is not inaptly termed the law of overruling necessity. It is that inherent and plenary power in a State which enables it to prohibit all things hurtful to the comfort and welfare of society." (Lakeview vs. Rose Hill Cemetery, 70 Ill., 192.)

Blackstone defines the police power to be, "The due regulation and domestic order of the kingdom, whereby the individuals of a State, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood and good manners, and to be decent, industrious and inoffensive in their respective stations." (4 Blackstone Com., 162.)

"It is to be observed, therefore, that the police of the government, as understood in the constitutional law of the United States, is simply the power of government to establish provisions for the enforcement of the common as well as the civil law maxim, *sic utere tuo ut alienum non laedas*. This police power of the State extends to the protection of the lives, limbs, health, comfort and quiet of all persons, and the protection of all property within the State. According to the maxim, *sic utere tuo ut alienum non laedas*, it being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which every one may so use his own as not to injure others." (Tiedman's Limitation Police Power, Sect. 1.)

"With the Legislature the maxim of law, *salus populi suprema lex*, should not be disregarded. It is the great

principle on which the statutes for the security of the people is based. It is the foundation of criminal law in all governments of civilized countries and other laws conducive to the safety and subsequent happiness of the people. This power has always been exercised, and its existence can not be denied. How far the provisions of the Legislature can extend is always submitted to its discretion, providing its acts do not go beyond the great principle of securing the public safety, within well defined limits, and with discretion is imperative. All laws for the protection of lives, limbs, health and quiet of the persons, and for the security of all property within the State, fall within this general power of government." (47 Me., 189.)

"Police power is right of State or State functionary to prescribe regulations for the good order, peace, protection, comfort and convenience of the community, which do not encroach on the Constiution."

New Orleans Gas Light Co. vs. Hart, 8 Am. State, Rep., 544.

"The police power is but another name for that authority which resides in every sovereignty to pass all laws for the internal regulation and government of the State necessary for the public welfare."

People vs. Budd, 15 Am. State Rep., 460.

"The police power of the State is the authority vested in the Legislature by the Constitution to enact all such wholesome and reasonable laws, not in conflict with the Constitution of the State or the United States, as they may deem conducive to the public good."

State vs. Moore, 17 Am. State Rep., 696.

"Police power of the State embraces its system of internal regulation by which it is sought to preserve the public order, and to prevent offenses against the State, and also to establish for the intercourse of citizen with citizen, those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each

the uninterrupted enjoyment of his own, so far as it is reasonably consistent with a like enjoyment of rights by others."

People vs. Squire, 1 Am. State Rep., 893.

"The police power under our system of government has been left to the States, and the only limit to its exercise in the enactment of laws is, that they shall not prove repugnant to the provisions of the State or National Constitution."

State vs. Moore, 17 Am. State Rep., 696.

"Legislatures may, subject to constitutional limitations, prescribe just and reasonable regulations and restraints upon the use which an owner makes of his property, so as to protect the rights of the public and of others to use their property."

State vs. Yopp, 2 Am. State Rep., 305.

"The police power of the State is not confined to regulations looking to preservation of life, health, good order and decency. Laws providing for the detection and prevention of imposition and fraud, as a general proposition, are free from constitutional objection."

People vs. Wagner, 24 Am. State Rep., 141.

"The State may institute any reasonable preventive remedy when the frequency of fraud, or the difficulty experienced by individuals in circumventing it, is so great that no other means will prove efficacious."

People vs. Wagner, 24 Am. State Rep., 141.

"Statutes intended to restrain or suppress manufacture and sale of oleomargarine and like compounds resembling and intended as a substitute for butter, is valid as a legitimate exercise of the police power of the State. Such legislation is justified upon the ground that the use of the inhibited compound is injurious to the public health."

Butler vs. Chambers, 1 Am. State Rep., 638.

The lottery franchise under which the plaintiff in error is asserting his claim to operate same is but a mere license

an indulgence granted by the State Government subject at any time to withdrawal and revocation. Upon this point we quote the following extracts:

"It might admit of some doubt whether the Act of 1829 grants any franchise, or constitutes any contract, either wth the commissioners therein appointed or with the turnpike corporation. It imposes certain duties on each. The Commissioners are required to use the license thus given, not for their own benefit but for a public purpose. The money procured by these proposed lotteries is to be paid over to the Fauquier and Alexander Turnpike Company, to be by them expended in the improvement and repair of the road."

Phalen vs. Virginia, 8 How[illegible]d, 166.

"The privilege to do wrong [illegible] not, it is believed, be thus purchased and fastened, like [illegible] shirt of Nessus, upon the community, without any power of getting rid of it for a quarter of a century. Such a doctrine would deprive the State of the power to right herself by repealing any reckless legislation whose tendency is to corrupt the fountain of public morals."

Moore vs. State, 48 Mississippi, 161.

"If we reverse, the inevitable result is that the associate partners enjoy an irrevocable license and monopoly to set up and carry on a lottery in this State for the term of twenty years, to end in October, 1888, and that in disregard of our present Constitution, and claimed only under the forms of an enactment which every member of this court considers to be clearly unconstitutional."

Boyd vs. The State, 53 Alabama, 615.

"We are not prepared to admit that it is competent for one Legislature, by any contract with an individual, to restrain the power of a subsequent Legislature to legislate for the public welfare, and, to that end, to suppress any and all practices tending to corrupt the public morals. (See Moore vs. The State, 48 Miss., 147; Metropolitan Board of Excise vs. Barrie, 34 N. Y., 663.)"

Boyd vs. Alabama, 94 U. S., 650.

"If this charter were granted exclusively to subserve some public purpose, as to raise means to promote common schools, it would not, within the intent of the Constitution, create a contract between the corporators and the State. But the legislative power would be complete, either to amend or abolish. The corporation would be but the instrumentality to accomplish a policy."

Miss. Society vs. Musgrove, 44 Miss., 836.

"A mere license can never contain the essence of a contract protected under the principles announced in Trustees of Dartmouth College vs. Woodward." (State vs. Norris, 77 N. C., 572; Moore vs. Mississippi, 48 Miss.; Reynolds vs. Glory, 26 Conn., 179; Tell vs. State, 42 Md., 519.)

It seems to us that the Legislature can make no contract bartering away its police powers that is binding upon future legislative bodies, neither can it authorize any one else to make such contracts. It can not surrender directly or indirectly its sovereign power to protect the health and the morals of the people.

"After an exhaustive research into the authorities upon this subject, we have been unable to find a case where a charter has been granted to deal in lotteries for a series of years that has been dignified with the name of contract, and protected by the Federal Constitution from the future legislation of the State." (Moore vs. State, 48 Miss., 160. And see Bass vs. The Mayor of Nashville, Meigs, 421; Boyd vs. Alabame, 94 U. S., 645.)

In speaking of the clause in the Constitution which forbids the passage of any law impairing the obligation of a contract, Parsons on Contracts, Third Vol., Sixth Ed., page 566, says:

"The question had also been raised, whether this clause of the Constitution limits or affects the power of the State to enact general police regulations for the preservation of

the public health and morals. Thus, if a Legislature grant a charter to a corporation to hold land for the purpose of burying the dead within the limits of a city, can a subsequent Legislature, for the purpose of preserving the health of the city, prohibit all persons from burying the dead within the limits of the city, and by this prohibition render their former grant useless and inoperative? Or can a Legislature, having authorized an individual or a company to raise a certain sum of money by lotteries, or after having licensed individuals to sell spirituous liquors for a certain period, afterwards, for the purpose of preserving the public morals recall such authority or license, by a general law prohibiting lotteries or the sale of spirituous liquors? And if this can be done where the grant or license was gratuitous, can it also be done if a certain price or premium was paid for it? While the authorities are not uniform, we consider the prevailing adjudication of this country to favor the rule, that such general laws are not in either case within the purview or prohibition of the Constitution."

Judge Cooley, in his work on Constitutional Limitations, 4th Edition, page 341, says: "Perhaps the most interesting question which arises in this discussion is, whether it is competent for the Legislature to so bind up its own hands by a grant as to preclude it from exercising for the future any of the essential attributes of sovereignty in regard to any of the subjects within its jurisdiction; whether, for instance, it can agree that it will not exercise the power of taxation or the police power of the State, or the right of eminent domain as to certain specified property or persons; and whether, if it shall undertake to do so, the agreement is not void on the general principle, that the Legislature can not diminish the power of its successors by irrepealable legislation, and that any other rule might cripple and eventually destroy the government itself. If the Legislature has power to do this, it is certainly a very dangerous power, exceedingly liable to

abuse, and may possibly come in time to make the constitutional provisions in question as prolific of evil as it ever has been, or is likely to be of good."

And again, Judge Cooley says: "Franchises, like every other thing of value, and in the nature of property, within the State, are subject to this power; and any of their incidents may be taken away, altogether annihilated by means of its exercise." Page 343.

Bearing upon the connection between the police power and public morals, Justice Bradley said in Beer Company vs. Mass. 97 U. S., 33. "Whatever difference of opinion may exist as to the extent and boundaries of the police power, and however difficult it may be to render a satisfactory definition of it, there seems to be no doubt that it does extend to the protection of the lives, health and property of the citizens, *and the preservation of good order and public morals.* The Legislature can not, by any contract, divest itself of the power to provide for these objects which demand the application of the maxim *salus populi suprema lex;* and they are to be obtained and provided for by such appropriate means as the legislative discretion may devise."

The defendant in error, also contends that the Act of 1872 allowing the council of the city of Frankfort to sell its lottery franchise, did not authorize its vendee to subsequently sell the same. A second sale was not authorized. A lease is assignable of common right, and its assignment could only be restrained by a specific provision, but a lottery franchise is a violation of common right, and is therefore not assignable unless in pursuance of a statute. Hence, Douglas acquired no vested interest in the franchise.

The terms of the contract under which the plaintiff in error claims, provides for the contingency of legislative or judicial interference, and seems to recognize and anticipate

legislative interference. This is shown by the following clause from the contract as admitted by the plaintiff in error: "It is agreed, however, that in the event the said party of the second part, his heirs or assigns, are at any time prevented or hindered from drawing said lottery or any class or classes thereof in this State by judicial or legislative proceedings, he shall not be required to pay any installment falling due during the time in which he may be so prevented or hindered until such prevention or hinderance is removed: Provided, that the party of the second part shall by notice in writing, served upon the mayor of the city of Frankfort, notify the parties of the first part of the date of the commencement of any such interference when the time of the computing of the interference shall commence from the date of said service of such notice and continue only so long as such prevention or hinderance as aforesaid shall actually exist. And it shall be the duty of the party of the second part to notify, in writing, the parties of the first part of the removal or cessation of such prevention or hinderance immediately thereon: And provided further, in case of any such interference as aforesaid, the actual time of the duration of such hinderance or prevention shall not be computed in the drawings of the classes aforesaid, if no such drawings are in fact made during said time, and all of said payments hereinbefore enumerated which shall fall due after the commencement of such interferences shall be respectfully postponed for the same length of time of said interference, and become due and payable accordingly."

Hence, we must conclude that the vendor of plaintiff in error recognized the right of the Legislature to revoke the franchise, for that reason protected himself from loss by the terms of the foregoing contract. He was dealing in a business that affected public morals, a license emanating from

the government—an indulgence in violation of common right —subject to revocation at the will of the Legislature. As said by Mr. Chief Justice Waite, he must have known that "no Legislature can bargain away the public health or the public morals—the people themselves can not do it, much less their servants."

We respectfully submit that the judgment of the Court of Appeals ought to be affirmed.

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